Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

77-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....., Misc.

In the matter of

THE VENDO COMPANY, a Missouri corporation,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND PETITION FOR MANDAMUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....., Misc.

In the matter of

THE VENDO COMPANY, a Missouri corporation,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioner, The Vendo Company, respectfully moves the Court for leave to file the petition for writ of mandamus annexed hereto. The reasons for granting this motion are stated in the petition.

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Dated: February 10, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....., Misc.

In the matter of

THE VENDO COMPANY, a Missouri corporation,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

Petitioner prays that a writ of mandamus issue to the Honorable Stanley J. Roszkowski, Judge, United States District Court for the Northern District of Illinois, Eastern Division, directing him to formally dissolve the preliminary injunction which this Court, in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), held was prohibited by statute (28 U.S.C. § 2283).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a). Service of the motion and petition has been made on Judge Roszkowski as well as the respondents in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977).

STATEMENT

At issue in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), was a preliminary injunction prohibiting Vendo's collection of final judgments of $7.5 million previously awarded to Vendo by the Illinois state courts, and unanimously affirmed by the Supreme Court of Illinois, against two of the respondents in the federal case, Harry B. Stoner

and Stoner Investments, Inc. While the plurality and concurring opinions differed as to the grounds for their conclusion that the injunction was barred by § 2283, all of the Justices subscribing to those opinions (constituting a majority of this Court) agreed that, in the circumstances of the case and as a matter of law, no exception to the statute was applicable. The case was accordingly "[r]eversed and remanded."

The respondents subsequently filed a petition for rehearing and a motion in this Court requesting a stay of the Court's mandate pending consideration of their petition. The motion for stay was presented to Justice Rehnquist and was denied by him on July 15, 1977. Respondents' subsequent reapplication to Justice Stevens for such a stay was denied by him on July 29, 1977, and the judgment of this Court issued on that date. The petition for rehearing was denied on October 3, 1977.

The Judgment of this Court, as issued by the Clerk (Appendix A), provided for reversal of the judgment of the lower court and, in terms routinely used for this purpose, ordered:

> "that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court."

On August 19, 1977, the Court of Appeals entered an order remanding the case to the District Court "for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977" (Appendix B).

Because of respondents' position that the injunction continued to be binding in spite of this Court's decision, Vendo thereupon filed a motion in the District Court asking that the preliminary injunction be formally dissolved. In response to petitioner's "position that we believe the injunction is not in force and effect" because of the Supreme Court's decision, the District Court stated:

> "I think so long as the injunction has not been dissolved, it is in force and effect. *I don't understand how it gets to be blown away becuse the Supreme Court said it should be blown away.* Until it is blown away it is still here." (Transcript, September 16, 1977, pp. 5-6; emphasis added.)

In their brief opposing Vendo's motion in the District Court, respondents urged the District Court to continue the preliminary injunction in effect indefinitely, arguing that such a result was permissible under their interpretation of this Court's opinions. In particular they contended, as they had in their motions for stay of this Court's mandate and their petition for rehearing, all of which were denied, that this Court had overlooked evidence in the preliminary injuction record.

The District Court declined to rule on petitioner's motion for dissolution of the injunction, and expressed uncertainty about the proper action to be taken on remand in light of the words "for further proceedings" in this Court's judgment. On the other hand, the District Court expressed the view that, notwithstanding this Court's reversal of the injunction and issuance of its opinion and judgment, the preliminary injunction is still in effect until dissolved, and any action by Vendo to collect its state court judgments would risk contempt.

On November 4, 1977, the case was reassigned from Judge Hubert L. Will to Judge Stanley J. Roszkowski, who was not sworn in as a Federal District Judge until approximately one month later. On November 16, 1977, Vendo filed in this Court a motion asking for clarification of this Court's judgment of June 29, 1977. On January 23, 1978, this Court denied the motion on the ground that the proper remedy for failure of a lower court to comply with a judg-

ment of the Supreme Court is by petition for mandamus. The denial was expressly without prejudice to the filing of such a petition. By letter dated January 25, 1978, petitioner sent Judge Roszkowski a copy of this Court's opinion of January 23 and requested that he enter an order granting Vendo's motion for dissolution of the injunction without delay.* Judge Roszkowski has, however, taken no action in the matter.

REASONS FOR GRANTING THE WRIT

On June 29, 1977, in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881, a majority of this Court held that the preliminary injunction granted by the District Court against Vendo violated the Anti-Injunction Act, 28 U.S.C. § 2283. While predicated on somewhat different grounds, both the plurality and concurring opinions of this Court undeniably reached that same conclusion. Accordingly, the decision of the Court of Appeals affirming the injunction was "reversed" and the case "remanded."

Notwithstanding that decision, notwithstanding the issuance of this Court's judgment after two denials of respondents' motion for stay, notwithstanding denial of respondents' petition for rehearing, and notwithstanding the pendency in the District Court, for over four months, of Vendo's motion for dissolution of the injunction, the injunction nevertheless still formally stands. While expressing itself in doubt as to the proper action to be taken on remand, the District Court nevertheless admonished Vendo that it regards the injunction as still in effect, and that any action by Vendo in violation of the injunction would risk contempt.

Vendo therefore requests that this Court require compliance with its decision in *Vendo* v. *Lektro-Vend,* stating

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* A copy of the text of Vendo's letter is annexed hereto as Appendix C.

expressly that the preliminary injunction should be dissolved forthwith, and if necessary issue a writ of mandamus to the District Court directing it to so act.*

This Court's Decision Clearly Requires Dissolution Of The Preliminary Injunction

A majority of this Court agreed that, in the circumstances of this case and as a matter of law, the District Court lacked the power to grant the preliminary injunction issued against Vendo because no exception to the Anti-Injunction Act was applicable. On that basis this Court "[r]eversed and remanded" the matter. Neither this Court's plurality opinion nor the concurring opinion contains any indication that the matter was to be remanded for additional findings or for a further hearing on the preliminary injunction issue while the injunction was kept in effect.

The plurality opinion held that § 16 of the Clayton Act does not under any circumstances expressly authorize injunctions against state court proceedings as an exception to the Anti-Injunction Act, and that no other exception to that Act was applicable. The two concurring Justices agreed that under the circumstances of this case no exception to the Anti-Injunction Act was applicable. They held

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* Vendo has applied to this Court for such relief, rather than to the Court of Appeals, because compliance with this Court's own decision is required. The Court of Appeals took no action on remand other than to further remand the matter to the District Court "for further proceedings in conformity with the opinion of the United States Supreme Court." (Appendix B.)

We feel confident that Judge Roszkowski, upon an express direction by this Court, would immediately comply therewith, without the necessity of actual issuance of the requested writ. *Cf. Bucolo* v. *Adkins,* 424 U.S. 641, 644 (1976); *United States* v. *Haley,* 371 U.S. 18, 20 (1962).

that § 16 may expressly authorize injunctions against state court proceedings only in the "narrowly limited circumstances" where those proceedings are part of a "pattern of baseless, repetitive claims" and thus constitute a "mere sham" under the *Noerr-Pennington* doctrine, as applied by *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972). And they determined that Vendo's state court case *did not and could not*—as a matter of law—fall within this "mere sham" exception. Noting that "the District Court failed properly to apply the *California Motor Transport* rule," the concurring opinion went on to hold that the District Court:

> "did not find a 'pattern of baseless, repetitive claims,' *nor could it have done so under the circumstances.* Only one state-court proceeding was involved in this case, *and it resulted in the considered affirmance by the Illinois Supreme Court of a judgment for more than $7 million.*" (97 S.Ct. at 2894; emphasis added.)

Accordingly, the concurring opinion concluded that § 16 of the Clayton Act "did not authorize the injunction below" and that "the state-court proceeding in this case should not have been enjoined by the federal court." (97 S.Ct. at 2893-94.)

It would be difficult to imagine a more definitive and conclusive determination of the injunction's invalidity and the District Court's lack of power to issue it. As Mr. Justice Stevens remarked in his dissenting opinion, "[the concurring opinion's] view that § 16 did not authorize the preliminary injunction entered by Judge McLaren is dispositive of this litigation." (97 S.Ct. at 2902.)

Clearly, upon issuance of this Court's decision and judgment and remand of the matter to the lower courts, formal dissolution of the preliminary injunction should have followed as a matter of course. However, the respondents have vigorously resisted entry of an order dissolving the injunction. Indeed, in opposing Vendo's motion in the District Court for dissolution of the injunction, respondents have contended that this Court's opinions actually permit indefinite continuation of the injunction in effect. The District Court, expressing doubt as to the proper course of action, has declined to grant Vendo's motion for dissolution, while admonishing Vendo concerning contempt sanctions in the event of any disobedience of the injunction, notwithstanding that this Court has pronounced the injunction invalid.

Respondents also contended in the District Court that their position was supported by the statement contained in this Court's judgment remanding the case "for further proceedings in conformity with the opinion of this Court." However, as this Court noted in its *per curiam* opinion of January 23, 1978 in *Vendo* v. *Lektro-Vend* (p. 1), that language is "customary in such documents." Under the circumstances, it is plain that an order dissolving the preliminary injunction is the only "further proceeding" on remand that would be "in conformity with" the opinions of this Court, apart from proceedings relating to the merits of respondents' treble-damage claims.

As this Court has expressly held, in a passage quoted at length in its January 23, 1978 opinion in *Vendo* v. *Lektro-Vend* (p. 3):

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter

> decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. . . . If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255 (1895).

Thus, in *Vendo* v. *Lektro-Vend,* the District Court is not free on remand to tamper with this Court's decision in any way, and in particular is not free to reconsider the evidence that was before this Court.

Yet such is precisely what the respondents have asked the District Court to do. Advancing essentially the same contentions as were made to this Court in their unsuccessful briefs on the merits, motions for stay of the mandate, and petition for rehearing, they have asked the District Court to continue the preliminary injunction in effect indefinitely. In effect, they have asked the District Court to grant the stay and the petition for rehearing which this Court denied. *And in that endeavor they have thus far succeeded, directly contrary to the June 29, 1977 decision of this Court.*

CONCLUSION

It is apparent that the District Court, on remand in *Vendo* v. *Lektro-Vend,* has failed to proceed "in conformity with" this Court's judgment. As a result, not only this Court's judgment but the Anti-Injunction Act and the important federal policies which it embodies have been further frustrated. Indeed, a decision of the highest court of the State of Illinois (a decision which this Court declined to review on certiorari) has been effectively nullified for three years by a preliminary injunction which this Court held over seven months ago was barred by the Anti-Injunction Act.

For the reasons stated, we therefore request that this Court direct compliance with its decision of June 29, 1977, and if necessary issue a writ of mandamus to the District Court commanding it to formally dissolve the injunction.

Respectfully submitted,

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Dated: February 10, 1978

Appendices

APPENDIX A

Supreme Court of the United States

No. 76-156

Vendo Company,

Petitioner,

v.

Lektro-Vend Corporation et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, Vendo Company, recover from Lektro-Vend Corporation et al. Nine Thousand Eight Hundred and Six Dollars and Fifty-five Cents ($9,806.55) for its costs herein expended.

June 29, 1977

Clerk's costs	$ 150.00
Printing of record	9,656.55
Total	$9,806.55

APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 19, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon.

Hon.

LEKTRO-VEND CORP., etc., et al.,
Plaintiffs-Appellees,

Nos. 75-1792 and 75-1793 vs.

THE VENDO COMPANY, etc.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65-C-1755
Judge McLaren

This matter comes before the court on the "STATEMENT BY THE VENDO COMPANY OF ACTION TO BE TAKEN BY THIS COURT ON REMAND FROM THE UNITED STATES SUPREME COURT" filed herein on August 4, 1977, by counsel for the defendant-appellant and "STATEMENT OF PLAINTIFFS-APPELLEES, LEKTRO-VEND CORP., STONER INVESTMENTS, INC. AND ANN M. STONER, AS ADMINISTRATOR OF THE ESTATE OF HARRY B. STONER, DECEASED, OF THE ACTION TO BE TAKEN BY THIS COURT ON REMAND FROM THE UNITED STATES SUPREME COURT" filed herein by plaintiffs-appellees on August 8, 1977, pursuant to Circuit Rule 19 of this court. This court being fully advised in the premises,

IT IS ORDERED that the matter is REMANDED to the district court for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977.

APPENDIX C

[Letterhead of
Sonnenschein Carlin Nath & Rosenthal omitted.]

JANUARY 25, 1978

BY MESSENGER
Honorable Stanley J. Roszkowski
United States District Judge
Federal Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Re: LEKTRO-VEND CORP. et al. v. THE VENDO COMPANY, No. 65 C 1755

Dear Judge Roszkowski:

In light of Monday's *per curiam* opinion of the Supreme Court in this case, we urge Your Honor to grant forthwith the pending Motion for Dissolution of Preliminary Injunction filed by defendant, The Vendo Company, on September 14, 1977*. The motion was filed in this Court on remand from the Supreme Court's decision of June 29, 1977**. In that decision, the Supreme Court reversed the preliminary injunction entered by Judge McLaren in this case on June 30, 1975. In the plurality and concurring opinions, a majority of the Supreme Court agreed that the preliminary injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, and therefore should not have been granted.

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* Also on file are a brief by plaintiffs in opposition to the motion and a reply brief filed by Vendo on October 3, 1977.

** *Vendo Co.* v. *Lektro-Vend*, 97 S.Ct. 2881 (1977).

On November 16, 1977, nearly a month before Your Honor was sworn in, Vendo filed a motion with the Supreme Court for clarification of its judgment. In Monday's *per curiam* opinion, a copy of which is enclosed, the Supreme Court denied the motion for clarification on the ground that the proper remedy for failure of a lower court to carry out a judgment of the Supreme Court is by petition for writ of mandamus, rather than on a motion for clarification, but emphasized that the action was without prejudice to Vendo's right to file such a mandamus petition.

In addition, the Supreme Court (p. 1) pointed out that, "while [the plurality and concurring] opinions did not agree in their reasoning, each of them concluded that the judgment of the Court of Appeals for the Seventh Circuit, which had in turn affirmed the issuance of an injunction by the District Court for the Northern District of Illinois, should be reversed." Significantly, the Court also stated (p. 3), quoting language from an earlier Supreme Court decision:

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree, is considered as finally settled. *The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate....*" (Emphasis added.)

Since a majority of the Supreme Court has agreed that the preliminary injunction issued in this case was prohibited by the Anti-Injunction Act, it is clear that the injunction must be dissolved. Nearly seven months have passed since the Supreme Court's decision; yet the injunction as a formal matter remains of record. As a result of Monday's opinion by the Supreme Court, we are reluctantly left with no alternative except to proceed with mandamus unless the injunction order is dissolved pursuant to our motion in this Court. We urge Your Honor to grant such relief forthwith.

For the Court's convenience, we also enclose another copy of our proposed form of order.

Respectfully submitted,

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Encs.
cc: Barnabas F. Sears
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Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1977.

No. 77-1131

In the Matter of

THE VENDO COMPANY,

Petitioner

BRIEF OF RESPONDENTS IN OPPOSITION TO VENDO'S MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS

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Dated: March 13, 1978

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1131.

In the Matter of

THE VENDO COMPANY,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO VENDO'S MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS

Petitioner The Vendo Company ["Vendo"] requests that this Court require compliance with its decision in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977), arguing that the preliminary injunction entered below should be dismissed "forthwith" and that this Court, if necessary, should issue a writ of mandamus to the District Court directing it to so act (Vendo's Petition for Writ of Mandamus ["Vendo Pet."], pp. 4-5).

There is nothing in the opinion of the Supreme Court or in its mandate, or in the mandate of the Circuit Court of Appeals, that directs "that the preliminary injunction should be dismissed forthwith." On the contrary, the judgment is a remand for the District Court to proceed in accordance with the opinion of the Supreme Court. Vendo's motion for leave to file a petition for mandamus is nothing more than an attempt by Vendo to force a summary disposition of its pending motion to dissolve the preliminary injunction, without a hearing on that motion in the District Court, and without even a ruling by the District Court.

Current Proceedings In The District Court

Vendo's motion to dissolve the preliminary injunction was filed in the District Court on September 16, 1977. Over the objections of Vendo, which sought summary dissolution of the injunction, the Court permitted respondents to file an answer to Vendo's motion, which was filed September 26, 1977. Vendo then filed a reply to respondents' answer on October 3, 1977.

On the same day, October 3, 1977, this Court denied respondents' petition for rehearing in *Vendo* v. *Lektro-Vend, supra.* Thereafter, two pretrial conferences were held in the district court before Judge Will in the month of October, in an effort to explore possible settlement of the litigation.

On November 4, the case was reassigned from Judge Will to Judge Roszkowski, who had been commissioned as a new federal judge on October 11. Judge Roszkowski was not sworn in until December 2. At that time, Judge Roszkowski received 315 civil cases and 30 criminal cases. Over 90 of the cases had pending one or more undecided motions that had been fully briefed, including four separate motions in this case.

In the meantime (after the case had been reassigned to Judge Roszkowski, but before he was sworn in), Vendo, on November 16, 1977, filed in this Court its Petition for Clarification, which was disposed of by this Court's *per curiam* opinion of January 23, 1978.

Two days later, on January 25, 1978, Vendo by letter sent Judge Roszkowski a copy of the *per curiam* opinion and again urged summary dissolution of the injunction (Vendo Pet., p. C-1). Respondents replied on January 31, 1978, stating that summary disposition of Vendo's motion to dissolve was unwarranted and suggesting that a hearing be held on Vendo's motion to dissolve and on respondents' answer thereto. Vendo's response on February 6, 1978 again urged that the preliminary injunction "be dissolved forthwith."

On February 10, Vendo served the instant Petition for Writ of Mandamus in this Court.

ARGUMENT.

A. This Motion And Petition Are Filed In The Wrong Court

Supreme Court Rule 31(3) requires a petitioner seeking issuance of a writ of mandamus to "set forth with particularity why the relief is not available in any other court." Vendo has not and cannot meet this essential prerequisite.

Vendo's motion and petition are bottomed on the failure of the District Court to act on Vendo's motion to dissolve the preliminary injunction. Vendo, however, has failed to present this matter to the United States Court of Appeals, but instead has come directly to this Court.*

This failure to present the question to the Court of Appeals is in direct contravention of the express terms of Supreme Court Rule 31, and on this ground alone the motion and petition must be denied.

Moreover, the judgment which Vendo seeks to enforce is the judgment of the Court of Appeals. That is the only judgment that the District Court has before it. That judgment states, in language similar to that of the Supreme Court in *Vendo* v. *Lektro-Vend, supra,* that "the matter is remanded to the district court for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977."

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* The only action ever taken by Vendo in the Court of Appeals was to argue, when the case was remanded from this Court to the Court of Appeals following decision in *Vendo* v. *Lektro-Vend,* that the Court of Appeals' judgment should state that the District Court must vacate the injunction on remand, rather than reverse the judgment and remand the cause for further proceedings in conformity with the Supreme Court opinion. This argument was, of course, made *before* the case was returned to the District Court and *before* Vendo filed the motion to dissolve in the District Court. Thus, the Court of Appeals has never been presented with or ruled on the instant petition, which seeks to mandamus the District Court for failing to (summarily) dissolve the preliminary injunction.

(Vendo Pet., p. B-1). Consequently, any attempt to mandamus the District Court should initiate in the Court of Appeals, not this Court.

B. Respondents Are Not Attempting To Obtain Relief In The District Court Denied Them On Rehearing In The Supreme Court; Rather, Respondents Seek New Relief Based On New Facts And Are Otherwise Proceeding In Conformity With This Court's Opinion.

Upon reversal and remandment by a reviewing court, the rights of the parties are determined, not on the facts as they existed at the time the injunction issued, but rather on the facts as they existed at the time the remandment order is presented to the District Court for decision. *Rudiger* v. *Coleman*, 126 N. E. 723, 328 N. Y. 225 (1920) (per Cardozo, J.).

Also, while the trial court is, of course, bound to give full effect to the mandate of the appellate court, it is "free to decide any matters left open by the appellate court's mandate." 9 *Moore's Federal Practice* ¶ 110.25[2]. This is the precise point made in the opinion cited by the Court in its *per curiam* opinion herein of January 23, 1978:

> ". . . the only matter which was or could be decided by this court, upon the record before it, was that the answer was sufficient. This court, in so deciding, could go no further than the Circuit Court could have done, had it made the like decision. Neither the Circuit Court, nor this court, upon adjudging that the answer was sufficient, could, without any consent or neglect on the part of the plaintiffs, deprive them of their right, under the general rules in equity, to file a replication.
>
> ". . . [W]hile the opinion declared that, assuming those facts, the mortgage was valid, yet both the opinion and the mandate ordered no final judgment for the defendant, but only ordered the judgment for the plaintiff to be reversed, and the cause remanded to the Circuit Court for

> further proceedings not inconsistent with the opinion of this court." *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, 258 (1895).

The *Sanford* opinion continues:

> "The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties.
>
> "*The case is quite different, in this respect, from those in which the whole case,* or all but a subsidiary question of accounting, *had been brought to and decided by this Court upon the appeal,* as in the cases principally relied on by the petitioner.
>
> "It must be remembered, however, that no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case." *Id.* at 259. (Citations omitted; emphasis added.)

The writ of mandamus was accordingly *denied* in *Sanford*.

The only question considered and decided by the Supreme Court in *Vendo* v. *Lektro-Vend* was whether the preliminary injunction, based on the record before the District Court and the findings of the Court, must be reversed (Per Curiam opinion, p. 1).

In the petition for rehearing, respondents urged that the findings, properly read in connection with the record, did not suffer from the deficiency found by the Supreme Court's concurring opinion and that Judge McLaren's findings, properly interpreted in the light of the evidence in the record, did encompass a finding of "a pattern of baseless, repetitive claims," even though the findings did not use those precise words.

The *per curiam* opinion sets forth respondents' contentions in the District Court in their answer to Vendo's motion to dissolve. The contrast between these contentions and those of the petition for rehearing is apparent.

In its answer to Vendo's motion to dissolve, respondents make the following contentions:

> 1. That the District Court should hold a new hearing so that respondents can present *further evidence, newly discovered since the prior hearing,* and make findings based thereon which would warrant a preliminary injunction against Vendo under the standards set forth in the concurring opinion.
>
> 2. That the District Court should make *new findings,* based on the evidence already in the record, of Vendo's pattern of baseless, repetitive litigation and of its grave abuse of the state courts by its efforts to enforce under state law agreements palpably violative of the antitrust laws. Either finding would also warrant an injunction under the concurring opinion.
>
> 3. In the alternative, that the District Court condition any dissolution of the preliminary injunction upon the *entry of an order along the lines of the "consent decrees"* Vendo offered in the lower court, which offer was renewed by Vendo before this Court in Vendo's opposition to respondents' petition for stay of mandate. The plurality opinion expressly relied on the availability of such relief in reaching its determination that the injunction should be reversed. Consequently, such decrees should now be entered by the District Court even if it should dissolve the preliminary injunction.

Thus, respondents' contentions in the District Court presently are—not that the District Court should overrule or ignore the Supreme Court—but that it should examine the trial court record, permit it to be supplemented by further evidence, and make

findings, fully warranted by that evidence, which would cure the deficiencies referred to in the Supreme Court's concurring opinion; or that, as a minimum, it enter a consent decree against Vendo along the lines discussed by the plurality opinion. All of these actions are fully within the power of the District Court upon remand, as the cases cited above (pp. 4-5) clearly demonstrate.

What Vendo fails to recognize is that its proceeding in this Court was an appeal from the entry of a preliminary injunction. A hearing on a preliminary injunction is not a full trial. A preliminary injunction is often entered on an incomplete record and it is perfectly proper to permit the District Court on remand to supplement that record, make additional findings and decide to issue or not to issue an injunction based on that supplemented record.

The reversal of a preliminary injunction does not finally determine the matter. It is in full "conformity with the opinion of this Court" to permit further evidence to be taken, to cure deficiencies in findings, and to issue or reissue an injunction warranted thereby. To do so would be to carry out, not to thwart, the order of the Supreme Court.

C. Vendo's Motion And Petition For Mandamus Are Premature And Unwarranted

Vendo's motion is based on nothing more than the failure of the District Court to act on Vendo's motion to dissolve (either to grant the motion, deny the motion, or, as respondents request, hold a hearing) in the two week period since this Court decided Vendo's Petition for Clarification.

Respondents submit that the district court should be given a reasonable time within which to decide Vendo's pending motion to dissolve.

Respondents further submit that if mandamus lies every time a new District Court Judge fails to decide within two weeks the 90 motions he is presented with upon his investiture, this Court

will be absolutely swamped with mandamus petitions. It is noteworthy in this regard that Vendo makes no mention whatever of the other fully-briefed motions pending before Judge Roszkowski in this very case.

CONCLUSION

Vendo seeks summary disposition of its motion to dissolve. It seeks to avoid a hearing on that motion and respondents' answer thereto. If Vendo's efforts are successful, Vendo will not only avoid an injunction, it will avoid even the protective provisions it has offered in its so-called consent decrees and in its assurances to the Supreme Court in its opposition to a stay of mandate pending rehearing.

This Court should deny leave to file the petition for mandamus. The case should be permitted to proceed in the District Court in conformity with the Supreme Court opinion. A hearing should there be held on Vendo's motion to dissolve and the answer thereto. When and if the District Court enters an order or takes other action not in conformity with the Supreme Court opinion, then it would be time for mandamus—not before.

Leave to file the petition should be denied.

Respectfully submitted,

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Dated: March 13, 1978.

Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1131

In the matter of

THE VENDO COMPANY, a Missouri corporation,
Petitioner.

REPLY OF PETITIONER IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND PETITION FOR MANDAMUS

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(1) Respondents do not deny that this Court's decision held the preliminary injunction to be invalid.

The crucial issue is whether this Court's decision of June 29, 1977, held the preliminary injunction to be invalid; if so, the injunction should promptly have been vacated on remand. Remarkably, in their brief in opposition to the petition for mandamus, *respondents do not even deny that this Court held the preliminary injunction to be invalid*—or, in the words of the concurring opinion, that "the state-court proceeding in this case should not have been enjoined by the federal court" (97 S.Ct. at 2893-94).

However, while tacitly conceding the invalidity of the preliminary injunction, respondents seek to get around that concession by arguing that this Court should nevertheless not take action to enforce compliance with its own judgment.

(2) Non-compliance with this Court's judgment cannot be excused because of the possibility that respondents may ultimately seek other relief not precluded by this Court's judgment.

In their brief in opposition (pp. 4-7), respondents' principal argument is that they "Are Not Attempting To Obtain Relief In The District Court Denied Them On Rehearing In The Supreme Court" and that instead "Respondents Seek New Relief Based On New Facts" (p. 4). They claim that the District Court should hold a "new hearing" so that they can present "further evidence, newly discovered since the prior hearing" which they claim would warrant entry of a *new* preliminary injunction (p. 6). But such contentions have nothing whatsoever to do with the issue before this Court on Vendo's petition.

To begin with, respondents have not filed any motion with the District Court asking for entry of a new preliminary injunction. Nor have they requested the District Court to hold a "new hearing".

But, in any event, respondents' argument is a *non sequitur*. Even assuming at this late date that they were to "seek new relief based on new facts", *that would not justify the continuation in effect of the preliminary injunction which this Court held to be prohibited by Section 2283.* In other words, irrespective of whatever rights or remedies may still be available to the respondents, there is no reason why the prior injunction, held to be invalid by a majority of this Court, should remain in effect in the interim.

Respondents (pp. 6-7) contend that the District Court "should examine the trial court record, permit it to be supplemented by further evidence, and make findings, fully warranted by that evidence, which would cure the deficiencies referred to in the Supreme Court's concurring opinion . . . ." Respondents have been free to file a motion seeking such relief, but they have not done so. Instead, their position is that the preliminary injunction issued in June 1975

and held invalid by this Court should be kept in force until such time as they choose to file such a motion and eventually obtain a ruling on their yet-to-be-filed motion. Respondents' position not only flouts this Court's decision but also defies logic and is wholly unsupported by precedent.

As this Court pointed out in its January 23, 1978 *per curiam* opinion (p. 3), quoting *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255 (1895):

> "[w]hen a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. . . . If the Circuit Court mistakes or misconstrues the decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this Court."

In language quoted by respondents (p. 5), the Court in *Sanford* (*id.* at 259) also admonished: "It must be remembered, however, that no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case."•

• Contrary to respondents' argument (pp. 4-5), the *Sanford* decision does not in any way support their position. In that case, the defendants asked the Supreme Court to order the trial court (*i.e.*, the "Circuit Court") to enter a final judgment in their favor on the merits, on remand from a prior decision of the Supreme Court which had merely reversed a decision *on the pleadings*. Defendants argued that the case had been submitted "on bill and answer" under the old federal Equity Rules, and that the Supreme Court's prior decision on the pleadings had therefore disposed of the merits of the whole case. The Supreme Court disagreed, and directed the trial court to proceed with completion of pleading and a trial on the facts.

(Footnote continued on next page)

(3) Mandamus relief is not "premature".

Respondents further contend (pp. 7-8) that mandamus relief would be "premature". This argument is similarly without merit.

If Vendo is correct, as set forth in the petition for mandamus, *and not controverted by respondents' brief in opposition,* that this Court's decision of June 29, 1977 invalidated the preliminary injunction, then it necessarily follows that the injunction should have been vacated over eight months ago. In these circumstances, compliance with this Court's judgment is long overdue and certainly is not "premature".*

(Footnote continued from previous page)

Obviously, no such issue is presented here. This Court's decision of June 29, 1977 was not a decision on the pleadings, but rather on the very power of the District Court to issue the 1975 preliminary injunction. While respondents concede that "no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case," they nevertheless now seek to relitigate the validity of the 1975 injunction—the very question decided by this Court in its June 29, 1977 opinion.

Rudiger v. *Coleman,* 328 N.Y. 225, 126 N.E. 723 (1920), cited by respondents at p. 4, is wholly inapplicable here. That case involved an intervening change of circumstances, occurring during the pendency of the appeal and remand, that had made it impossible for the lower court to carry out the directions contained in the Court of Appeals' mandate. The Court of Appeals had directed that on remand an order be entered compelling reconveyance of certain real estate, but in the meantime part of the property had been condemned and thus could no longer be reconveyed. Here, there is no possible argument that the judgment of this Court cannot be carried out. At most, respondents seek an opportunity to present further evidence of facts occurring *prior* to entry of the injunction and thus seek to litigate matters which have already been decided.

* It is significant, moreover, that the District Judge has chosen not to file any objection to the mandamus petition, although he was served in accordance with this Court's Rules and its January 23, 1978 *per curiam* opinion and had a clear opportunity to object if he wished. On the contrary, we believe that the District Judge would welcome this Court's instructions on the matter.

(4) This Court should enforce its own judgment.

Respondents (pp. 3-4) also question petitioner's statement (Petition, p. 5) that "Vendo has applied to this Court for such relief, rather than to the Court of Appeals, because compliance with this Court's own decision is required". The petition further points out (p. 5) that "The Court of Appeals took no action on remand other than to further remand the matter to the District Court 'for further proceedings in conformity with the opinion of the United States Supreme Court' ".

It is well-established that a petition for mandamus to enforce this Court's judgment should be directed to this Court. As pointed out in Stern and Gressman, Supreme Court Practice (4th Ed. 1969), p. 413:

> "One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court. *When the mandate in question is that of the Supreme Court, application for the writ must, of course, be made to that Court.*" (Emphasis added.)

Indeed, this Court's January 23, 1978, *per curiam* opinion in this case (p. 3) recognized the propriety of this Court's issuance of mandamus in such circumstances.

Only this Court can effectively enforce its own judgment, and it is now abundantly plain that any other course would result in further unconscionable delay—not only in securing compliance with this Court's decision of June 29, 1977, but also in giving effect to the Illinois Supreme Court decision of November 27, 1974, which this Court held had been wrongfully enjoined.

CONCLUSION

Respondents tacitly concede that this Court held the preliminary injunction to be invalid, but nevertheless seek to keep the invalid injunction in effect. It is difficult, we believe, to conceive of a clearer case for mandamus relief.

For the reasons stated above and in the petition for mandamus, the Court should direct dissolution of the preliminary injunction and if necessary issue a writ of mandamus to that effect.

Respectfully submitted,

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Dated: March 20, 1978